BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The jurisdiction of this court is set out and the evidence is sufficiently narrated in the petition in support of which this brief is filed. Upon this evidence it is submitted that whether the "scintilla" rule (applicable in North Carolina) is applied or the rule of "reasonable evidentiary support" the case was one for submission to the jury.

We will endeavor to show that the weight of authority sustains our contention that upon a showing of death by external and violent means and nothing more, leaving the manner of death to inference and deduction, even in those jurisdictions where the presumption against suicide is not indulged, the case goes to the jury for decision upon the whole evidence. We will endeavor to show further that the opinion of the Circuit Court of Appeals for the Fourth Circuit in this case is at variance with the rule laid down in North Carolina, in other circuits and by the Supreme Court to which this petition is directed as well as with the authorities generally.

That this court will issue writ of certiorari and examine the evidence for the purpose of ascertaining whether there is a direct conflict of testimony upon matters of fact and whether the case is one which should have been submitted to the jury is settled:

Pennsylvania Railroad Co. vs. *Chamberlain,* 288 U. S. 333, 77 L. ed. 819;
Stirling vs. *Constantine,* 287 U. S. 378, 77 L. ed. 375;
Lumbra vs. *United States,* 290 U. S. 551, 78 L. ed. 492;
New York Life Insurance Company vs. *Gamer,* 303 U. S. 161, 82 L. ed. 726.

The North Carolina Rule.

It should be recalled, in limine, that the application for policy in this case was made and the policy issued in North Carolina. And the law of that State, Consolidated Statutes, Section 6287, reads as follows:

> "All contracts of insurance on property, lives or interests in this State shall be deemed to be made there; and all contracts of insurance, the applications for which are taken within the State, shall be deemed to have been made within the State and are subject to the laws thereof."

Certainly with reference to the forfeitures pleaded Section 15 of the policy here under consideration, would seem to make the decisions of the North Carolina Court controlling, for in that section it is provided as follows:

> "If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the State in which the insured resided at the time this policy issued, such limitation is hereby extended to agree with the minimum period permitted by such law."
>
> (See copy of policy filed with Record.)

It should also be noted in this connection that since the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 82 L. Ed. 1188, there would seem to be no doubt that the local law, that is the North Carolina law, is controlling, whether that law be declared by statute or decision. And if this reversal of *Swift* v. *Tyson* is to accomplish the beneficial results envisioned there must be no "scuttling" of nor "whittling" at the decision such as is suggested by the contentions of our adversaries in this case.

Lastly, it will be borne in mind that in this case death from external and unexplained violence was admitted by

both parties and, even though in this case there is plenitude of additional evidence supporting the theory of homicide and contradicting that of suicide, the North Carolina rule, upon this single admission, would carry the case to the jury which alone could pass upon the credibility of evidence (*e. g.*, evidence allegedly identifying particles in brain as powder) offered by way of contradiction and defense.

The law of North Carolina upon the question involved in this case seems clearly established by decision of its highest court. The case of *Warren* v. *Insurance Co.*, 215 N. C. 402, 2 S. E. (2d) 17 (1939), involved a policy excepting not only suicide but also cases of "intentional and unlawful killing."

> "There is a distinction, with respect to the burden of proof, between the rule applicable to actions upon ordinary life insurance policies containing exceptions, where proof of policy and death of insured imposes upon the insurer the burden of sustaining the pleaded exception, and the rule applicable where the insurance is against death by accident or accidental means. In the latter case well considered authorities in this and other jurisdictions support the view that where unexplained death by violence is shown, the defendant who seeks to avoid liability on the ground that the death resulted from bodily injuries intentionally inflicted by another person, has the burden of going forward with the evidence—that is that evidence of death by external violence is sufficient to take the case to the jury—but that the burden of the issue of death by accidental means still remains upon the plaintiff, Gorham *v.* Insurance Co., 214 N. C. 526; N. Y. Ins. Co. *v.* Gamer, 303 U. S. 161; Jefferson Standard Life Ins. Co. *v.* Clemmer, 79 Fed. (2nd) 724."
>
> See also Wharton *v.* Ins. Co., 178 N. C. 135, 100 S. E. 261.

It is important to note in this case that Judge Devin, writing for an unanimous court, cites as authority for this position, the decisions in *Gorham* v. *Ins. Co.*, 214 N. C. 526—the companion case to the case at bar. This conclusively shows the construction put upon that decision by the North Carolina Court itself.

In *McGill* v. *Lumberton*, 215 N. C. 752, 754, 3 S. E. (2d) 324, the court says:

> "Evidence of violent death, unexplained, suggests accident rather than suicide. The inference from violent death is sufficient to raise a *prima facie* case of death by accident."
>
> See same case, 218 N. C. 586, decided Dec. 11, 1940, to same effect.

In the same case on page 755 Justice Barnhill, dissenting on another aspect of the case, says with reference to the question here presented:

> "I do not consider Warren *v.* Ins. Co., *ante* 402, authoritative except as to the point that evidence of death by violent means is *prima facie* evidence of death by accident. In that case plaintiff was suing on the double indemnity provision of a life insurance policy which included a clause excluding death by suicide. If the plaintiff was only required to make out a *prima facie* case of death by violent means, evidence of violent death was sufficient for that purpose. As the defendant sought to avoid liability under the exclusion clause the burden then shifted to it to show suicide."

So it appears that the law of North Carolina, in the case of suit upon an accident policy, is that proof of death by ~~eternal~~ violence takes the case to the jury not by virtue of any presumption but by virtue of the probative force of the fact of death from external violence considered in

connection with the abnormality of suicide. These facts in connection with all other facts and circumstances are then to be considered by the jury and a verdict rendered in the light of the rule that the burden of the issue of death by accidental means is upon the plaintiff. It is not for the court but for the jury to give the law's answer to the question as to whether the insured came to his death by external, violent and accidental means or by an act of suicide.

From American Jurisprudence, Volume 29, Insurance, Section 1445 we may quote the following:

> "While in an action on an accident policy the burden is on the plaintiff to show that death was caused by an accident, and where it is doubtful from the evidence whether the death was caused by an accident or by suicide, a presumption arises that an accident and not suicide was the cause of death."

In this connection and particularly in the light of *Erie Railroad* v. *Tompkins,* it is interesting to note the situation created by the ruling of the Circuit Court of Appeals which it is here sought to bring up for review.

Two policies (accidental death) were written in North Carolina on this same life. The one in Pacific Mutual was for two thousand five hundred ($2,500) dollars and the one involved in this case for seven thousand five hundred ($7,500) dollars. Two suits were brought by this same plaintiff in Nash County, North Carolina to collect on these policies. The same counsel represented both defendants. One case, involving less than three thousand ($3,000) dollars, remained for trial in the State Court. The second (this case) was removed to the Federal District Court. At the trial of the first case the same evidence was offered as herein and in that case, according to the Record and the decision of the Supreme Court of North Carolina, the same attorneys conceded the right of plaintiff to have her cause tried by

jury on the issue of accidental death, though insisting on the insufficiency of plaintiff's showing of excuse against forfeitures. In *Gorham* v. *Insurance Co.*, 214 N. C. 526, and on rehearing in 215 N. C. 195, the North Carolina Supreme Court held against them in these contentions and held it a case for the jury. The concluding paragraph of the opinion by Chief Justice Stacy is enlightening.

> "It all comes to this: the policy had been carried for twelve years and was in force at the death of insured. Plaintiff demands payment. Defendant pleads non-coverage and forfeiture. Plaintiff replies by saying that, in her helplessness, neither the contract nor the law required of her an impossible or vain thing, and she craves the privilege of being heard before a jury. The law will not deny her this right."

On rehearing in that case this defendant insisted that it had not conceded the point of sufficiency of evidence on the issue of accidental death but the court "quoting the Record" held for the second time that such concession had been made. Result, an order for trial by jury.

In this companion case the defendant now not only denies the right of trial on the accidental death issue but again insists that plaintiff should be denied jury trial on the forfeiture issues and has persuaded the District Judge and the Circuit Court of Appeals to so hold. Result in this case on the same evidence, plaintiff is denied jury trial on all issues.

Particularly interesting in this connection is a quotation from the brief of our adversaries which was filed in the Supreme Court of North Carolina in this companion case and a copy of which was also deposited with the Circuit Court of Appeals in connection with the hearing of this case. We quote from that brief as follows:

> "This case, pending in the State Court, was tried at the April-May Term, 1938. The plaintiff's appeal from an adverse judgment will not only be determina-

> tive in this case, but under the recent decisions of the United States Supreme Court. Erie R. R. *vs.* Tompkins, 82 L. ed. 1188; Ruhlin *v.* New York Life, 82 L. ed. 823; Hudson *v.* Moonier, 82 L. ed. 986; N. Y. Life *v.* Jackson, 82 L. ed. 933) the decision in the case at bar will, in all likelihood, be determinative of the case brought on the $7,500 policy now pending in the Federal Court. Swift *v.* Tyson has been overruled. Counsel in both cases, for both plaintiff and defendant, are the same. The case therefore involves a large sum of money."

Further on this phase of the matter it may be observed that in North Carolina the presumption against suicide is regularly indulged. By some it is insisted that, because suicide or attempt at suicide is a crime, this presumption is but another form of the universally recognized presumption of innocence. And by all it is agreed that the presumption of innocence is the strongest known to the law and is available in civil as well as in criminal proceedings. *Forbes* vs. *Burgess,* 158 N. C. 131, 73 S. E. 792. Such presumption, especially where buttressed by the additional and supporting evidence offered in this case, would carry the case to the jury under the North Carolina decisions.

Finally, on this phase of the matter, the following brief excerpts from the opinion of Justice Brandeis in the *Erie R. R.* vs. *Tompkins* case make clear the comprehensiveness of that decision.

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of Federal concern."

And later the following:

> "Supervision over either the legislative or the judicial action of the States is in no case permissible ex-

cept as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as it is permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."

In *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202 (an action upon an insurance policy) it is said:

> "Questions arising in the Federal Courts concerning the proper construction of contracts of insurance are governed, even in the absence of State statutes, by the decisions of the appropriate State court, and this rule applies though the question arises in a suit in equity."

In *Hudson* vs. *Moonier,* 304 U. S. 397, it was held:

> "In a personal injury action against driver of truck which was operated without proper equipment, and against lessor who leased the truck to the driver's employer, the Federal Court was required to determine lessor's liability by application of law of State where the plaintiff's injury occurred rather than by application of the general law."

To the same effect are:

New York Life Insurance Company vs. *Jackson,* 304 U. S. 261;

Rosenthal vs. *New York Life Insurance Company,* 304 U. S. 263.

Analysis of Opinion Below.

The opinion, review of which is here sought, held:

(1) That the evidence taken as a whole establishes suicide so clearly as to leave no room to doubt what the fact is, citing *Gunning* vs. *Cooley,* 281 U. S. 90, 94.

But does it? Two expert pathologists reached different conclusions on the facts in evidence. The defendant itself,

in the companion case before the North Carolina Supreme Court, conceded the sufficiency of this same evidence to carry the case to the jury. Upon a fair review of the Record and evidence as outlined above we submit that the court, in order to reach such a conclusion, must itself pass upon the credibility of debated testimony and accept as conclusive the defendant's interpretation thereof. *Gunning* vs. *Cooley*, cited in the opinion, certainly supports submission to the jury of the evidence where "the credibility of witnesses" and "the weight of the evidence" are involved.

(2) That this is the test in the Federal courts.

But is it? In cases such as this, where the State law controls, (and here it does by Statute of North Carolina, by policy provision and by virtue of the doctrine of *Erie R. R.* vs. *Tompkins*) the proper test is the one prevailing in the State courts or in cases where there was reasonable support for different conclusions.

In view of these suggestions *Small & Company* vs. *Lamborn*, 267 U. S. 248, 254 (which also was decided prior to *Erie R. R.* vs. *Tompkins*) is easily differentiated.

(3) That the defendant is not bound by its admission of the sufficiency of the evidence, made in the companion case in the North Carolina Courts.

But even so if the defendant itself then thought that the same evidence was sufficient to require jury consideration is not this rather persuasive on the question of whether "fair minded men might honestly draw different conclusions on the testimony offered"—an accepted measure of the sufficiency of evidence in all litigation and particularly in *Gunning* vs. *Cooley*, 281 U. S. 90.

(4) That the question here presented is controlled by Federal rather than State practice.

But is it? We submit:

(a) That in this case the law of North Carolina is controlling by virtue of the North Carolina Statute, by virtue of the policy provision and by virtue of the doctrine of *Erie R. R.* vs. *Tompkins.*

(b) That *Herron* vs. *Southern Pacific,* (283 U. S. 91) is not authority for the holding under consideration because that case dealt with a Constitutional provision which clearly cut into a right or defense recognized by the Federal Courts.

(c) That *Barrett* vs. *Virginian Ry. Co.,* 250 U. S. 472, is not in conflict since, on this Record, both questions of conflict and credibility of evidence are involved.

(d) That all cases cited in the Circuit Court opinion antedate the decision in *Erie R. R.* vs. *Tompkins.*

The Rule in Other Circuits and Generally.

The decision here under review withdrawing the case from jury consideration is in conflict with the decisions in six other circuits. We will note some of the cases from each of these and make brief reference to the general current of authority. Cases principally relied upon are underscored.

From the Third Circuit we cite:

Fidelity & Casualty Co. vs. *Pittenger,* 63 F. (2d) 880;
Mutual Life Ins. Co. vs. *Graves,* 25 F. (2d) 705.

From the Fifth Circuit we cite:

Equitable Life Assurance Society vs. *Salmen,* 81 F. (2d) 571 (Double indemnity);
New York Life Ins. Co. v. *Brown,* 39 F. (2d) 376. (Double indemnity);
Mutual Life Ins. Co. v. *Garner,* 75 F. (2d) 384. (Double indemnity);

Mayfield v. *Aetna Life Ins. Co.*, 100 F. (2d) 199. (Double indemnity);

Fidelity & Casualty Co. v. *Driver*, 79 F. (2d) 713 (accident policy).

From the Seventh Circuit we cite the following:

Metropolitan Life Ins. Co. v. *Hogan*, 63 F. (2d) 654 (accident policy);

Mo. State Life Ins. Co. v. *Pater*, 15 F. (2d) 737;

New York Life Ins. Co. v. *Melgard*, 74 F. (2d) 489 (double indemnity);

Standard Accident Ins. Co. v. *Van Altena*, 67 F. (2d) 836 (accident policy);

Federal Life Ins. Co. vs. *Zebec*, 82 F. (2d) 961 (accident policy);

Warbende v. *Prudential Ins. Co.*, 97 F. (2d) 749 (double indemnity).

From the Eighth Circuit we cite the following:

Columbian Nat'l. Life Ins. Co. v. *Comfort*, 84 F. (2d) 291 (accident policy);

Pacific Mutual Life Ins. Co. v. *Brooks*, 14 F. (2d) 307 (accident policy);

Waldo Fertilizer Co. v. *Mutual Life Ins. Co.*, 72 F. (2d) 203 (double indemnity);

Tschudi v. *Metropolitan Life Ins. Co.*, 72 F. (2d) 306 (double indemnity);

Mutual Life Ins. Co. v. *Hatten*, 17 F. (2d) 889 (double indemnity).

From the Ninth Circuit we cite the following:

Connecticut General Life Ins. Co. v. *Maher*, 70 F. (2d) 441 (accident policy), certiorari denied 293 U. S. 591;

Kansas City Life Ins. Co. v. *Bowman*, 102 F. (2d) 510 (double indemnity);
Cochran v. *Mutual Life Ins. Co.*, 79 Fed. 46, 48.

From the Tenth Circuit we cite:

Frankel v. *New York Life Ins. Co.*, 51 F. (2d) 933 (double indemnity);
Mo. State Life Ins. Co. v. *West*, 67 F. (2d) 468 (accident policy).

Even in the Fourth Circuit the decision in *Jefferson Standard Life Insurance Company* v. *Clemmer*, 79 F. (2d) 724, so much relied upon, is easily distinguishable upon the facts, and the following quotation from that case is interesting:

> "These reflections lead us to adopt the sounder view that the presumption against suicide is not evidence at all, but is a rule of law which in a case of this kind requires the conclusion, in the event of an unexplained death by violent injury, that the death was not suicidal until credible evidence of self-destruction is offered. When such evidence is offered, whether it be in the course of the plaintiff's proof or by the defendant, the presumption as a rule of law disappears from the case and the trier of facts passes upon the issues in the usual way * * * When the case goes to the jury, they are at liberty to take into consideration the abnormality of suicide and to give such probative force, as their judgment dictates, to the fact upon which the presumption is based, that is, in a case of this sort, to the fact of death by violence; but 'it is not weighed down by any artificial additional probative effect; they may estimate it for just such intrinsic effect as it seems to have under all the circumstances.' "

The rule generally prevailing is well set forth in the quotation above made from 29 *American Jurisprudence*, Title *"Insurance"*, Section 1443.

See also 64 *C. J.* 432, Section 426, and 6 *Couch, Cyclopedia of Insurance Law,* Section 1262R.

The Rule in This Court.

We respectfully call attention to the decisions of this court in the following cases:

New York Life Ins. Co. v. *Gamer,* 303 U. S. 161, 114 A. L. R. 1218, from which we quote the following:

> "The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence. (Citing cases.)
>
> "In determining whether by the greater weight of evidence it has been established that the death of the insured was accidental, the jury is required to consider all admitted and proved facts and circumstances upon which the determination of that issue depends and, in reaching its decision, should take into account the probabilities found from the evidence to attend the claims of the respective parties."

We respectfully direct attention to the rule laid down by Justice Black in his dissenting opinion from which we quote as follows:

> "Proof of death by external and violent means has uniformly been held to establish death by accident. The extreme improbability of suicide is complete justification for a finding of death from accident under these circumstances. While it has been said that this proof of *accidental death* was based on "presumption", in reality—whatever words or formulas are used—what is meant is that a litigant has offered adequate evidence

to establish accidental death. To attribute this *adequacy of proof* to a "presumption" does not authorize or empower the judge to say that this "adequate proof" (identical with legal "presumption") has "disappeared." If the evidence offered by plaintiff provides adequate proof of accidental death upon which a jury's verdict can be sustained, mere *contradictory* evidence cannot overcome the original "adequate proof" unless the authority having the constitutional power to weigh the evidence and decide the facts believes the contradictory evidence has overcome the original proof. The *jury*—not the *judge*—should decide when there has been "substantial" evidence which overcomes the previous adequate proof."

See also *Del Vecchio* v. *Bowers*, 296 U. S. 280, where the court held that upon conflicting evidence "the issue must be resolved upon the whole body of truth pro and con."

Lastly.

The trial court in this case did not even direct a verdict. In violation of Constitutional guarantees and all established procedure it withdrew the case from the jury and itself answered the issues. (R. 1 and 2). Thus the District Court substituted a trial by judge for a trial by jury.

Respectfully submitted,

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